
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

Date: April 25, 1983
Case No. 82-ERA-2

In the Matter of

Dean Dartey,
Complainant

v.

Zack Company of Chicago
(Subcontractor, Midland
Nuclear Power Plant, Midland,
Michigan),
Employer

DECISION AND FINAL ORDER

Statement of the Case

A recommended decision and order has been submitted to me by Administrative Law Judge Robert J. Feldman under section 5851 of the Energy Reorganization Act of 1974 (42 U.S.C. 5851) (ERA) and 29 CFR 24.6. That statute prohibits covered employers from discharging or otherwise discriminating against any employee with respect to the employee's compensation, terms, conditions, or privileges of-employment because the employee has filed a complaint of violation of the ERA, or has assisted, participated or testified in a proceeding for the enforcement of the Act. Judge Feldman held a hearing on March 16, 1982 on a complaint filed by Dean Dartey that he had been suspended and then discharged by the

---

Zack Company of Chicago (Zack) because he had filed a charge against Zack of violation of the ERA with the Nuclear Regulatory Commission. Judge Feldman has recommended

that Zack be found in violation of section 5851 for its suspension of Mr. Dartey, but not for it termination of him 30 day later. Because I find that Zack had a sufficient basis for discharging Mr. Dartey at the time it did so, as well as for suspending him (and would have both discharged and suspended him even absent his complaint to the NRC), the ALJ's recommended decision will be modified accordingly and the complaint will be denied.

FACTS

Zack Company of Chicago is a heating, air conditioning and ventilation contractor In 1980 when this case arose, Zack was a subcontractor of Bechtel Power Corporation, which was constructing a nuclear power plant at Midland Michigan for, Consumers Power Corporation. Dean Dartey was hired by Zack on January 10, 1980 an a Quality Control Inspector Trainee. After undergoing training for five or six weeks, he was promoted to the position of Level One Quality Control Inspector for visual inspections. His duties were to inspect the heating, air conditioning and ventilation fabrication in the fabrication shop and its installation in various parts of the nuclear power plant under construction. If anything was wrong with the fabrication or installation, the inspector would tag the piece in question and write either, a non-conformance, report (NCR) or a hold report. These reports were logged and held, open until the defect or problem was repaired or, resolved. Mr. Dartey's immediate supervisor was Tom Franchuck, a, Level Two Quality Control Inspector, who, was, supervised by, Mike D'Haem, the Quality Control Manager for Zack at the Midland plant site. Mr. Dartey found, when working as an inspector, that only minor defects re,ported by him were resolved but major ones were not. Mr. Dartey testified that Tom Franchuck told him if he (Dartey) reported all the defects he found, he would be fired; that Franchuck said conflicts between quality control and production would be resolved in favor of production. When this happened repeatedly, and he felt he had exhausted internal avenue to correct the problem, he contacted the Nuclear Regulatory Commission. His first contact with the NRC was by tele- phone around February 20, 1980. He subsequently had two meetings with NRC investigators at their trailer on the Midland site, and one meeting at a motel nearby. At these meetings, Mr. Dartey gave the NRC investigators documents which supported his allegations, and made a written statement detailing his charges on March 12, 1980.

Sometime between March 7 and March 10, 1980, Zack became aware that the NRC would conduct an investigation of its com- pliance with the ERA at the Midland plant as a result of a com- plaint by Mr. Dartey. A meeting of quality control inspectors was called by Mike D'Haem on March 13, 1980 to instruct them on how to conduct themselves during the NRC investigation. Mr. D'Haem told them not to hinder the investigation, to answer all questions truthfully, and that no one was to have access to records except two designated inspectors (Dartey was not one).

On March 17, 1980 Mr. Dartey was interviewed by Zack's attorney, The Vice President for operations, and Mike D'Haem. He was asked why he had made allegations to the NRC and why he thought there were problems at the Midland plant. At that time, he denied contacting the NRC. On the same day, Mr. Dartey was taken off field inspections and given office work involving making lists of documents. In addition, he was ordered not to leave his desk and to tell the other person in the office when he went to the bathroom.

Two days later, on the morning of March 19, 1980 Mr. Dartey complained to Mr. D'Haem about the work he had been assigned and they had a "heated discussion." When Mr. Dartey said he would not go back to the desk work, Mr. D'Haem suspended him for one day. After- some confusion which delayed his departure, Mr. Dartey started to drive off the plant site. He was stopped by security guards at the gate who asked to search his truck because they thought there were documents in it. Under the driver's seat they found about 15 personnel files of Zack Quality Control Inspectors which Mr. Dartey had taken from the company vault. After Mike D'Haem and the Zack job site superintendent identified ,the documents, Mr. Dartey was taken into the Consumers' Power security office where he, was questioned by the Chief of Security and made a written statement. In it, he said he had the files for about three days, although at the hearing he testified it was for a longer period.

Mike D'Haem consulted with the President of the Zack Company, Christine Zack DeZutel and the company attorney about what action to take on this incident. Although Mike D'Haem advised firing Mr.Dartey, Ms. DeZutel ordered that he be suspended for 30 days to conduct an investigation. She was aware of the charged atmosphere at the plant as a result of the NRC investigation and that other employees knew Mr. Dartey had contacted the NRC and was concerned they might have planted the papers on his truck.

After he was suspended, Mr. Dartey contacted the NRC to file a reprisal complaint. He was referred to several different offices and agencies in the Department of Labor, and OSHA took a formal written complaint of retaliation from him dated April 3, 1980. The

---

day after he was suspended, Consumers Power, under pressure from the NRC, ordered all Zack's work at the Midland plant stopped.

Zack tried to get a copy of Mr.Dartey's written statement to the Chief of Security and finally got one on April 18, 1980. After consultation with company attorneys, the President decided to terminate Mr. Dartey because his statement made clear that he had taken the documents. He was notified of his discharge by telegram which he received on April 21, 1980. The telegram recited six reasons for his termination, including unauthorized removal of personnel files.

Ms. DeZutel testified that a number of other Zack employees had filed charges with the NRC during the same time period, both at Midland and at other nuclear plant sites one received a promotion and one was discharged eight months later or poor attendance; none of the others was disciplined.

DISCUSSION

Before considering the retaliation issue in this case, I want to make clear my approval of the ALJ's ruling on Zack's motion to dismiss. The ALJ rejected Zack's arguments that the complaint should be dismissed because it was not filed with the Wage and Hour Division within 30 days of the alleged violation (see 29 CFR 24.3(b) and (d)), and because the Secretary did not issue a final order in the case within 90 days of receipt of the complaint (see 42 U.S.C. 5851(b)(2)(A)). I adopt the ALJ's discussion and reasoning in his ruling on both points.[1]

This case falls under the category of so-called disputed and dual motive discharge cases which arise under employee protection provisions found in a wide variety of statutes. (See, e.g. title VII of the Civil Rights Act of 1964, as amended, Section 704(a), 42 U.S.C. 2000e-3(a), the Fair labor Standards Act of 1938, as amended, section 15(a)(3), 29 U.S.C. 215(a)(3); National Labor Relations Act, section 8(a)(4), 29 U.S.C. 158(a)(4)). Mr. Dartey alleges he was suspended and discharged for contacting and filing a charge with the Nuclear Regulatory Commission against Zack. Zack defends its discipline and discharge of Mr. Dartey on the grounds that he had a poor work record and took personnel files without permission.

I think it would be useful to set forth the general principles which I will apply to retaliatory adverse action cases arising under 29 CFR Part 24 and the statutes enumerated there because similar questions arise in almost all these cases. There are two leading Supreme Court cases which, taken together, establish the overall framework for analyzing the evidence in a retaliatory adverse action

---

case and evaluating whether the parties have met their respective burdens of production or going forward with the evidence, and burdens of proof or persuasion. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981) dealt with the initial stages of proof in an intentional discrimination case under Title VII of the Civil Rights Act of 1964 which I think is equally applicable to cases arising under 29 CFR Part 24. In *Burdine*, the Supreme Court made clear that the plaintiff always bears the burden of proof or persuasion that intentional discrimination has occurred. In *Mt. Healthy City School District Board of Education* v.*Doyle*, 429 U.S. 274 (1977), a retaliatory adverse action case under the Constitution which is closely analogous to 29 CFR Part 24 cases, the Supreme Court set forth the nature of the burden of proof or persuasion which falls upon the defendant once the plaintiff has carried his burden of proof. *Mt. Healthy* has been applied explicitly by at least one Circuit Court of Appeals to section 5851 of the Energy

Reorganization Act. *Consolidated Edison Company of New York* v. *Donovan*, 673 F.2d 61 (2nd Cir. 1982); *Jaenisch* v. *U.S. Department of Labor and Chicago Bridge and Iron Company*, F.2d (No. 81-4149, 2nd Cir. June 28, 1982.) Cf. *DeFord* v. *Secretary of Labor*, F.2d , (Nos. 81-3228 etc., 6th Cir., February 10, 1983).

Under *Burdine*, the employee must initially present a prima facie case consisting of a showing that he engaged in protected conduct, that the employer was aware of that conduct and that the employer took some adverse action against him. In addition, as part of his prima facie case, the plaintiff must present evidence sufficient to raise the inference that . . . protected activity was the likely reason for the adverse action. *Cohen* v. *Fred Mayer, Inc.*, 686 F.2d 793 (9th Cir. 1982) (applying *Burdine* to a retaliatory discharge claim under section 704(a) of Title VII). If the employee establishes a prima facie case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. Significantly, the employer bears only a burden of producing evidence at this point, the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. *Burdine*, *supra*, 450 U.S. 248, 254-255. If the employer

---

successfully rebuts the employee's prima facie case, the employee still has "the opportunity" to demonstrate that the proffered reason was not the true reason for the employment decision . . .. [The employee may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Id. at 256 (citation omitted.) The trier of fact may then conclude that the employer's proffered reason for its conduct is a pretext and rule that the employee has proved actionable retaliation for protected activity. Conversely, the trier of fact may conclude that the employer was not motivated, in whole or in part, by the employee's protected conduct and rule that the employee has failed to establish his case by a preponderance of the evidence. *Id.* at 254-265. Finally, the trier of fact may decide that the employer was motivated by both prohibited and legitimate reasons, i.e., that the employer had "dual motives."

Under *Mt. Healthy*, if the trier of fact reaches the latter conclusion, that the employee has proven by a preponderance of the evidence that the protected conduct was a motivating factor in the employer's action, the employer, in order to avoid liability, has the burden of proof or Persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the abse- nce of the protected conduct. *Mt. Healthy supra*, 429 U.S. 274, 287; *Consolidated Edison Company of New York* v. *Donovan*, *supra*, 673 F.2d 61, 63.

It is important to note that the flow and presentation of evidence in a hearing often will not be as finely tuned and carefully orchestrated as the discussion of these rules may

suggest. These rules are to be applied by the ALJ to the extent practicable during the hearing and, of course, to the record as a whole at the close of the hearing. I agree with the ALJ that Mr.Dartey established a prima facie case that Zack was aware of his contacts with the NRC, which are protected activities under section 5851 and that this protected activity was the likely reason for his suspension and discharge because it took place shortly after he contacted the NRC. In addition. Mr. Dartey has proven, by a preponderance of the evidence, that Zack's actions against him were motivated in part by his protected activities. A number of the circumstances surrounding the adverse actions support such on inference, e.g., being interrogated by the company attorney and Vice President; being removed from inspections and given routine clerical tasks; being ordered not to leave his desk; being told not to report violations found; being discharged shortly after his contacts with the NRC. I cannot agree, however, that a distinction should be drawn

---

between the act of suspending Mr. Dartey for 30 days and discharging him.[2] When Mr. Dartey was charged on April 21, 1980 the only additional facts the company had which it did not have when it suspended him were a copy of his statement to the Chief of Security admitting that he had taken the documents and had them in his possession for three days; the stop work order from Consumers Power; and notice of Mr. Dartey's complaint to the Department of Labor of retalia- tion. When Zack suspended Mr. Dartey they knew he had the files in his possession; he did not protest the suspension on that ground or claim that he had not taken the files, or that they bad been planted in his truck; it was clear that he had no authority to remove personnel files or indeed even to look at them; he had apparently violated an explicit instruction- about access to documents from Mike D'Haem.

In these circumstances, Zack may well have been justified in firing Mr. Dartey immediately. When it only suspended him, it was acting out of an excess of caution because there was a possibility there was another explanation for the documents being in his truck, and because it was mindful of the protections of section 5851. Courts have given employers considerable discretion to protect their legitimate interests in confidentiality, and have upheld the immediate termination of employees who appropriated records without-authority. In *Jeffries v. Harris County Community Action Association* 615 F.2d 1025 (5th Cir. 1980) the court held that even where an employer wrongly believes a company policy has been violated, it does not violate the retaliation provision of Title VII by acting on that belief. In addition, copying and dissemination of confidential materials for purposes of proving illegal conduct by the employer was found in *Jeffries* not to be protected activity unless the employee shows that there was a danger the documents would be destroyed. There are formal legal avenues available for obtaining evidence in investigations and enforcement proceedings. See *Hodgson* v. *Texaco Inc.*, 440 F.2d 662 (5th Cir. 1971) (employee's appropriation of records without permission for use in lawsuit against employee is not protected activity under Fair Labor

Standards Act). Further, it is significant that the evidence did not show that other employees who had engaged in similar conduct were treated more leniently.

I do not think the ALJ should have given so much weight to the factors which led him to conclude that Zack did not carry its burden of proof on the suspension issue. (Rec. Dec. p. 10.) Certainly, finding the files in his truck supports an inference that Mr. Dartey took them, particularly when he did not deny it when he was caught with the files. Since he had no authority even to look at the files, whether he took them off-site is irrelevant, as is his intent to retain them. Having them in his truck as he drove to the gate implies intent to take them off site. He also never claimed he received them from an authorized source.

In conclusion, Mr. Dartey committed an act which no employer need tolerate misappropriation of confidential company records- which warranted suspension or discharge in the discretion of the employer. Zack has carried its burden of showing that it would have suspended and fired Mr. Dartey for that conduct even in the absence of his protected activities.

Therefore, it is ORDERED, that the ALJ's Recommended Deci- sion and Order are modified in accordance with this Final Order, and the complaint is denied. 29 CFR 24.6(b)(4).

RAYMOND J. DONOVAN
Secretary of Labor

Signed at Washington, D.C.
April 25, 1983.

ENDNOTES

[1] In addition to the ALJ's conclusion that filing in the wrong office of the right agency is not fatal, I also note that filing with the wrong agency by a layman who has not slept on his rights can also toll a statute of Limitations. See *Morgan* v. *Washington Mfg. Co.*, 660 F.2d 710 (6th Cir. 1981).

[2] I note that I also agree with the ALJ that the other reasons given for discharge were not substantiated by Zack. They probably were included in the discharge telegram as make weights.